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Wynn Resorts (Macau) SA v Poh Yang Hong

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HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-507–12 OF 2017
MOHD NAZLAN J
23 JULY 2018

C

Civil Procedure — Pleadings — Rejoinder — Defendant sought leave of court to file rejoinder to plaintiff's reply to defence — Whether application wrongly premised on O 18 r 14 of the Rules of Court 2012 ('the ROC') when it should have been O 18 r 4 — Whether proposed rejoinder superfluous and unnecessary as it substantially contained bare denials and putting of plaintiff to strict proof of its allegations — Whether even without rejoinder there was implied joinder of issue on reply to defence where every material allegation of fact was denied — Whether defendant barred by res judicata and issue estoppel from arguing same issues he had raised in earlier failed attempt to expunge parts of the reply to defence — Whether defendant's application an abuse of process — Rules of Court 2012 O 18 r 14(2)(a) & (4)

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The plaintiff's instant action was to recover the amount owing by the defendant under a credit facility which the plaintiff had granted to him to gamble at its casino in Macau. In his defence, the defendant pleaded that the plaintiff's claim was unenforceable/unrecoverable based on s 31 of the Contracts Act 1950 and s 26 of the Civil Law Act 1956. In reply to that defence, the plaintiff asserted that the facility granted to the defendant was legal under the laws of Macau and that he was being dishonourable and unconscionable in trying to use provisions in Malaysian laws to deny the plaintiff of its rightful claim. The plaintiff alleged that the defendant was a professional gambler and listed out the various casinos around the world he had gambled in. The plaintiff said it was induced to grant the defendant the credit facility because he had a good record of repaying substantial loans granted to him in the past for the purpose of gambling. The defendant had taken particular objection to the list of casinos the plaintiff had set out in its reply and also the charge that he was a 'dishonourable debtor trying to squirm his way' out of repaying the facility which he had enjoyed the full benefit of. Following his failure in a previous application to expunge those paragraphs, the defendant filed the instant application for leave to file a rejoinder to the plaintiff's statement of reply premised upon O 18 r 14 of the Rules of Court 2012 ('the ROC') and/or the court's inherent jurisdiction.

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Held, dismissing the application:

(1) The defendant's application was untenable. No legitimate basis was shown for leave to be granted. For starters, the defendant had wrongly premised his application upon O 18 r 14 of the ROC, when it ought to have been O 18 r 4. On that ground alone, and in the absence of an explanation from the defendant as to why he had made his application under O 18 r 14, the instant application could not be sustained and had to be refused (see paras 30, 34 & 47).

(2) The defendant's proposed rejoinder was superfluous and entirely unnecessary. There was no substantive response in the rejoinder to the plaintiff's statement of reply other than the making of simple denials or putting the plaintiff to strict proof of its allegations or saying that its pleadings were irrelevant, prejudicial and an abuse of process. The defendant did not provide any real reply to the allegations made in paras 4.6 and 4.10 of the plaintiff's reply. There was no attempt whatsoever to state why those allegations were false or untrue (see paras 37 & 39–40).

(3) The court could not see the logic behind the defendant's insistence on asking for a rejoinder (or to expunge the reply pleadings, earlier) as what was proffered in the proposed rejoinder were, for all intents and purposes, bare denials. Pursuant to O 18 r 14(2)(a) and (4) of the ROC, there was, at the close of pleadings, an implied joinder of issue on the statement of reply, being the pleading last served. A joinder of issue operated as a denial of every material allegation of fact made in the reply. Hence, there was no risk of the pleadings in the statement of reply being deemed admitted by the defendant merely because he had not filed a rejoinder to the reply. The burden was on the plaintiff to prove its case. Whether the matters it had pleaded were relevant to its claim was a burden the plaintiff had to discharge at the trial even if the defendant had not pleaded that the plaintiff was put to strict proof of those assertions (see paras 26 & 41–43).

(4) The defendant's application was fatally impaired by reason of res judicata and issue estoppel since all the grounds canvassed in support of the instant application were a repeat of his earlier unsuccessful attempt to expunge paras 4.6 and 4.10 in the statement of reply on substantially the same grounds. The specific issues in contention had already been adjudicated upon. The defendant's application did little to advance the fair, just and economical disposal the case and, if not tantamount to a borderline abuse of process, it did not promote an efficient administration of justice at all (see paras 11, 49–50 & 56).

[Bahasa Malaysia summary

Tindakan plaintif ini adalah untuk mendapatkan jumlah yang terhutang oleh defendan di bawah kemudahan kredit yang telah diberikan oleh plaintif kepadanya untuk berjudi di kasino di Macau. Dalam pembelaannya, defendan memplid bahawa tuntutan plaintif tidak dapat dikuatkuasakan/tidak dapat dipulihkan berdasarkan pada s 31 Akta Kontrak 1950 dan s 26 Akta Undang-Undang Sivil 1956. Sebagai jawapan kepada pembelaan tersebut, plaintif menegaskan bahawa kemudahan yang diberikan kepada defendan adalah undang-undang di bawah undang-undang Macau dan bahawa dia menjadi memalukan dan melampau dalam cuba menggunakan peruntukan dalam undang-undang Malaysia untuk menafikan plaintif tuntutannya yang sah. Plaintif mendakwa bahawa defendan adalah seorang penjudi profesional dan menyenaraikan pelbagai kasino di seluruh dunia yang dia telah berjudi. Plaintif berkata ia telah dipengaruhi untuk memberi defendan kemudahan kredit kerana dia mempunyai rekod yang baik untuk membayar balik pinjaman besar yang diberikan kepadanya pada masa lalu untuk tujuan perjudian. Defendan telah mengambil bantahan tertentu untuk senarai kasino yang telah dinyatakan oleh plaintif dalam jawapannya dan juga pertuduhan bahawa dia adalah seorang 'penghutang yang memalukan yang cuba untuk menggeledah jalannya' daripada membayar balik kemudahan yang dia telah nikmati manfaat penuh. Berikutan kegagalannya dalam permohonan terdahulu untuk menghapuskan perenggan-perenggan tersebut, defendan memfailkan permohonan ini bagi kebenaran untuk memfailkan *rejoinder* kepada penyataan balas plaintif didasarkan pada A 18 k 14 Kaedah-Kaedah Mahkamah 2012 ('KKM') dan/atau bidang kuasa mahkamah.

Diputuskan, menolak permohonan:

(1) Permohonan defendan tidak dapat dipertahankan. Tiada asas sah ditunjukkan untuk kebenaran diberikan. Sebagai permulaan, defendan telah salah memohon permohonannya pada A 18 k 14 KKM, ketika sepatutnya adalah A 18 k 4. Atas alasan itu sahaja, dan dalam ketiadaan penjelasan daripada defendan tentang mengapa dia membuat permohonannya di bawah A 18 k 14, permohonan ini tidak dapat dikekalkan dan harus ditolak (lihat perenggan 30, 34 & 47).

(2) *Rejoinder* yang dicadangkan oleh defendan adalah berlebihan dan tidak diperlukan. Tiada jawapan substantif dalam *rejoinder* kepada penyataan balas plaintif selain daripada membuat penafian mudah atau meletakkan plaintif untuk bukti ketat dakwaannya atau menyatakan bahawa plidingnya tidak relevan, memudaratkan dan penyalahgunaan proses. Defendan tidak memberikan apa-apa jawapan yang nyata kepada tuduhan yang dibuat dalam perenggan 4.6 dan 4.10 dalam jawapan plaintif. Tiada percubaan untuk menyatakan mengapa tuduhan tersebut

palsu atau tidak benar (lihat perenggan 37 & 39–40).

(3) Mahkamah tidak dapat melihat logik di sebalik desakan defendan atas permintaan untuk *rejoinder* (atau untuk menghapuskan jawapan pliding, sebelumnya) sebagaimana yang diluluskan dalam *rejoinder* yang dicadangkan tersebut adalah, bagi semua maksud dan tujuan, penafian semata-mata. Selaras dengan A 18 k 14(2)(a) dan (4) KKM, terdapat pada penutupan pliding, satu penyataan tersirat isu-isu mengenai penyataan jawapan, yang menjadi pliding terakhir disampaikan. Satu penyatuan isu-isu yang dikendalikan sebagai penafian setiap tuduhan fakta material dibuat dalam jawapan. Oleh itu, tiada risiko pliding dalam penyataan balas yang disifatkan sebagai diterima oleh defendan semata-mata kerana dia tidak memfailkan *rejoinder* kepada Jawapan. Beban adalah di atas plaintif untuk membuktikan kesnya. Sama ada perkara yang diplidkan relevan dengan tuntutannya adalah beban yang plaintif perlu tunaikan pada perbicaraan walaupun defendan tidak memplid bahawa plaintif telah diletakkan untuk bukti ketat dakwaannya (lihat perenggan 26 & 41–43).

(4) Permohonan defendan telah terjejas teruk oleh sebab res judicata dan isu estopel kerana semua alasan yang ditujukan untuk menyokong permohonan ini adalah ulangan percubaan sebelum ini yang tidak berjaya untuk menghapuskan perenggan 4.6 dan 4.10 dalam penyataan balas secara substansial atas alasan yang sama. Isu-isu khusus dalam pertikaian telah diadili. Permohonan defendan tidak banyak membantu pelupusan kes yang adil, saksama dan ekonomi dan, jika tidak sama dengan penyalahgunaan proses, ia tidak mempromosikan pentadbiran keadilan yang cekap (lihat perenggan 11, 49–50 & 56).]

Cases referred to

Amalan Tepat Sdn Bhd v Panflex Sdn Bhd [2012] 2 MLJ 168, FC (refd)
Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)
Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615, HC (refd)
Bakti Dinamik Sdn Bhd v Bauer (M) Sdn Bhd [2016] MLJU 1878; [2016] 10 CLJ 247, HC (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)
Bruce v Odhams Press Limited [1936] 1 KB 697, CA (refd)
Chua Gek Kuon v Seow Chai Seng [1991] 1 SLR (R) 614, HC (refd)
ESP Synergy Sdn Bhd v KB Enviro Sdn Bhd [2018] 8 MLJ 516, HC (refd)
Greenhalgh v Mallard [1947] 2 All ER 255, CA (refd)
Harry v Davey (1876) 2 Ch D 721, Ch D (refd)
Henderson v Henderson [1843–60] All ER Rep 378; (1843) 3 Hare 100 (refd)

Herbert and another v Vaughan and others [1972] 1 WLR 1128, Ch D (refd)
International Shipcare Sdn Bhd v The owner of and other persons interested in the ships or vessels MV 'EL HADJAR' registered at the port of Annaba, Algeria; MV 'AIN TEMOUCHENT', MV 'NEMEMCHA' and MV 'NEDROMA' which are all registered at the port of Algiers, Algeria [2015] 7 MLJ 753, HC (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)
Norris and another v Beazley [1874–80] All ER Rep 774; (1877) 2 CPD 80 (refd)
SA Andavan v Registrar of Titles, Negeri Sembilan & Ors [1977] 2 MLJ 220 (refd)
Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee) [1998] 4 MLJ 651, CA (refd)
Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141, CA (refd)
Star City Pty Ltd (FKA Sydney Harbour Casino Pty Ltd) v Tan Hong Woon [2001] 3 SLR 206; [2001] 2 SLR (R) 36, HC (refd)
Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185, SC (refd)
Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor [2000] 1 MLJ 479, CA (refd)
Wong Sin Fan & Ors v Ng Peak Yam & Anor [2011] 9 CLJ 873, CA (refd)

Legislation referred to

Civil Law Act 1956 s 26
Contracts Act 1950 s 31
Rules of Court 2012 O 18 rr 4, 7, 8, 8(1), 10, 12(1)(a), 14, 14(2), (2)(a), (4), 19

Richard WG Lee (Shiyamala Devi Manokaran with him) (Jeff Leong Poon & Wong) for the plaintiff.
Dahrick Sivam Balakrishnan (Albar & Partners) for the defendant.

Mohd Nazlan J:

INTRODUCTION

[1] This is an application by the defendant for leave to file a rejoinder to the plaintiff's statement of reply under O 18 r 14 of the Rules of Court 2012. At the conclusion of the hearing, I refused leave and highlighted the broad reasons for my decision. This judgment contains the full grounds for the decision.

KEY BACKGROUND FACTS

The parties

[2] The plaintiff operates a casino resort and hotels in the Macau special administrative region of China. The defendant attended the casino resort of the plaintiff at the material time.

The transaction

[3] It is contended by the plaintiff that then, upon the defendant's request, a credit facility had been granted to the defendant by the plaintiff in Macau as permitted by the laws of Macau.

The suit

[4] Given the failure of the defendant to make repayment of the facility, the plaintiff commenced the instant writ action against the defendant to recover the credit facility.

[5] It is a key defence of the defendant's response, as pleaded in his statement of defence, that the credit extended by the plaintiff was used for the purpose of gambling at the plaintiff's casino. This in turn, according to the defendant would be contrary with the provisions of s 26 of the Civil Law Act 1956 as well as of s 31 of the Contracts Act 1950, rendering the credit granted by the plaintiff to be unenforceable and thus irrecoverable in Malaysia.

THE REPLY INTENDED TO BE IMPUGNED

[6] In its reply to the defence, the plaintiff sought to address the argument of the defendant relying on the alleged unenforceability of the credit facility by asserting that s 26 of the Civil Law Act 1956 and s 31 of the Contracts Act 1950 are procedural provisions (see *Star City Pty Ltd (FKA Sydney Harbour Casino Pty Ltd) v Tan Hong Woon* [2001] 3 SLR 206; [2001] 2 SLR (R) 36).

[7] In essence, the plaintiff argued that equity may be used to deprive a litigant of the benefit of a procedural provision as 'equity will not permit statute to be used as an engine of fraud', in the sense of being an unmeritorious and unconscionable conduct (constructive or equitable fraud).

[8] The cases such as in *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141 and *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee)* [1998] 4 MLJ 651 are asserted to be in support of this principle. If this argument of the plaintiff is successful, the defendant would thus be precluded from relying on his principal defences under s 26 of the Civil Law Act 1956 and s 31 of the Contracts Act 1950.

[9] Specifically, in paras 4.6, 4.9, 4.10, 4.11 and 4.12 of the statement of reply, the plaintiff pleaded as follows:

> 4.6 The Defendant has since 1999 been an active patron and/or gambler at many renowned and/or international casino viz:
>
> (1) Westgate Resorts (United States of America [the Defendant's account was set up there on 19.2.1999]);
>
> (2) Crown Casino (Melbourne, Victoria, Australia [the Defendant's account was set up there on 16.5.2002]);
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> (3) Bellagio (Las Vegas, Nevada, United States of America [the Defendant's account was set up there on 12.12.2006]);
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> (4) Wynn Las Vegas/Encore Las Vegas (Las Vegas, Nevada, United States of America [the Defendant's account was set up there on 24.12.2006]);
>
> (5) Casino De Genting (Genting Highlands, Pahang, Malaysia [the Defendant's account was set up there on 7.7.2007]);
>
> (6) The Venetian Macao (Macau [the Defendant's account was set up there on 10.12.1998]);
>
> (7) City of Dreams (Macau [the Defendant's account was set up there on 20.6.2009])
>
> ...
>
> (17) Crockfords Casino (London, United Kingdom [the Defendant's account was set up on 26.8.2015]);
>
> (18) Aspinall's (London, United Kingdom [the Defendant's account was set up there on 2.11.2015]).
>
> 4.9 The Defendant's record of playing at numerous renowned/international casinos and of repaying substantial credit facilities extended to him by the Plaintiff prior to the Loan had led, influenced and/or encouraged the Plaintiff to provide the Loan to him.
>
> 4.10 The Defendant is a dishonourable debtor, trying to squirm his way out of his liability and obligation to repay the Loan to the Plaintiff, after having acknowledged and wholly enjoyed the full benefit of the Loan in Macau, requested by the Defendant in Macau and granted by the Plaintiff in Macau as permitted by and under the law in and of Macau.
>
> 4.11 This is a case where the Defendant, a Malaysian, had as a long-standing regular patron of the Plaintiff with an impressive history/record asked and influenced the unknowing and unsuspecting Plaintiff (a non-Malaysian entity) to give the Defendant certain credit facilities i.e. the Loan, repaid part of it, defaulted in the repayment of the rest and subsequently pulled out of his sleeve arguments on allegedly Malaysian legal strictures and public policy to one-up on the Plaintiff when the suit herein for the repayment of the balance due under the Loan was initiated against the Defendant.

4.12 The Defendant's unmeritorious and unconscionable conduct as aforesaid ought not to be countenanced by the Court in the interest of justice and equity.

[10] Thus, the plaintiff submitted that as above-stated in para 4.11 in the statement of reply, this is a case where the defendant, a Malaysian, had as a long-standing regular patron of the plaintiff's casino with an impressive history, influenced the unsuspecting plaintiff, being a non-Malaysian entity to extend the defendant the credit facility, who repaid part of it, but defaulted in the repayment of the rest and thereafter conveniently introduced arguments on Malaysian legal provisions and public policy to justify non-recoverability of the facility.

DISMISSAL OF AN EARLIER APPLICATION TO EXPUNGE

[11] I had dismissed the defendant's application to expunge paras 4.6 and 4.10 of the statement of reply. I attributed the refusal to a number of reasons.

[12] First, as I mentioned, the reason the plaintiff relied on to justify its pleadings in the statement of reply was to make the important assertion that the defendant is guilty of unconscionable and unmeritorious conduct. This, in my view would be in accord with the requirements of O 18 r 8(1) of the Rules of Court 2012 ('the RC') which read as follows:

8 Matters which shall be specifically pleaded (O 18 r 8)

(1) A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality —

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; and

(c) which raises issues of fact not arising out of the proceeding pleading.

[13] As such, what the plaintiff intended to achieve in the statement of reply was to plead the necessary facts pursuant to O 18 r 8(1) to demonstrate that the defence of the opposing party, the defendant herein, is not maintainable (see *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615).

[14] I accept the defendant's contention that in the case of *International Shipcare Sdn Bhd v The owner of and other persons interested in the ships or vessels MV 'EL HADJAR' registered at the port of Annaba, Algeria; MV 'AIN TEMOUCHENT', MV 'NEMEMCHA' and MV 'NEDROMA' which are all registered at the port of Algiers, Algeria* [2015] 7 MLJ 753, which followed the

English decision in *Herbert and another v Vaughan and others* [1972] 1 WLR 1128 it was held that it is trite law that in the statement of reply, a plaintiff cannot plead a new cause of action or raise any new ground or a claim inconsistent with the statement of claim. And that in the event the defence provides reasons for setting up a new cause of action, the correct step to be taken which is in accord with O 18 r 10 of the RC 2012 is instead to amend the statement of claim, and not to deliver a reply.

[15] But that was not the situation in the present case before me. The plaintiff was merely responding to the defences raised by the defendant in the statement of defence. There was no new cause of action introduced by the defendant.

[16] I did not consider it difficult to agree that paras 4.6 and 4.10 in the statement of reply appear to be legitimate pleadings which are necessary to establish that the defences relied on by the defendant vis a vis s 26 of the Civil Law Act 1956 and s 31 of the Contracts Act 1950 are not maintainable, as well as they relate to the issues raised in the statement of defence, and in any event were relevant to the case.

[17] Secondly, the application to expunge instituted by the defendant was said to be grounded on O 18 r 10, primarily the rule that 'A party shall not in any pleading make an allegation of fact or raise any new ground or claim inconsistent with a previous pleading of his'. It reads thus:

> 10 Departure (O 18 r 10)
>
> (1) A party shall not in any pleading make an allegation of fact or raise any new ground or claim inconsistent with a previous pleading of his.
>
> (2) Paragraph (1) shall not be taken as prejudicing the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.

[18] However, there was nothing in paras 4.6 and 4.10 which could be said to tantamount to an allegation of fact, a new ground, or a claim which could be argued to be in any discernible fashion inconsistent with the plaintiff's previous pleadings in the statement of claim, which continued to be clearly premised on an action for breach of contract.

[19] Further, the new pleadings in the statement of reply, paras 4.6 and 4.10 in particular are material facts. It is trite that under O 18 r 7 of the RC 2012, material facts must be pleaded, for these are the material factors which are necessary for the purpose of formulating a complete cause of action. In *Bruce v*

Odhams Press Limited [1936] 1 KB 697, Scott LJ said:

> The word 'material' means necessary for the purpose of formulating a complete cause of action, and if any one 'material' fact is omitted, the statement of claim is bad.

[20] It is after all trite that a party is entitled to have from the opposing party, particulars of facts, as opposed to evidence, relevant to the issues at stake in order to prevent surprise, in order to enable the other party to know the exact case he has to meet, especially since parties cannot at trial adduce evidence in support of facts which were not pleaded facts (see the Supreme Court decision in *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185).

[21] Further, O 18 r 12(1)(a) of the RC 2012 also provides that:

> 12 Particulars of pleading (O 18 r 12)
>
> (1) Subject to paragraph (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words —
>
> ...

[22] Thirdly, I had also dismissed the application to expunge by reason of the uncertain basis of the same. As mentioned earlier, the application to expunge was premised on O 18 r 10. It was not instituted on the basis of the usual provisions of striking out of pleadings embodied in O 18 r 19.

[23] Reliance on O 18 r 10 to achieve what ought to have been more correctly done under O 18 r 19 was therefore wholly misconceived. Order 18 r 10 does not provide for pleadings or any parts thereof to be struck out. And after all, a statement of reply is plainly a form of pleading (see *ESP Synergy Sdn Bhd v KB Enviro Sdn Bhd* [2018] 8 MLJ 516). There is no basis for a pleading such as paras 4.6 and 4.10 of the statement of reply to be expunged unlike an affidavit or evidence given on oath.

[24] The defendant's other argument on the court's inherent powers to expunge the said paragraphs too is similarly flawed, for the court's inherent powers do not confer or constitute a source of jurisdiction (see the Federal Court decision in *Amalan Tepat Sdn Bhd v Panflex Sdn Bhd* [2012] 2 MLJ 168).

[25] Fourthly, I refused the application because it was also erroneously argued by the defendant that he had been denied the opportunity to respond to

the said paras 4.6 and 4.10 of the statement of reply. The defendant maintained that the matters raised in the reply pleadings were serious and fresh allegations directed against the defendant, questioning his integrity, which justified the position that the defendant must be afforded an opportunity to refute the same.

[26] This was entirely untenable because pursuant to O 18 r 14(2) and (4) of the RC 2012, there is at the close of pleadings an implied joinder of issue on the statement of reply, being the pleading last served. A joinder of issue operates as a denial of every material allegation of fact made in the reply (see *Chua Gek Kuon v Seow Chai Seng* [1991] 1 SLR (R) 614 at p 620).

[27] Not only that. The defendant in fact had the option of invoking O 18 r 4 of the RC 2012 to make a response to the statement of reply, by filing a further pleading provided however that leave of court was obtained. The defendant chose not to pursue this; much to its own detriment.

THE PRESENT APPLICATION TO FILE REJOINDER

[28] Following the refusal of the application to expunge, the defendant continued to pursue the matter by filing the instant application which seeks leave to file a rejoinder to the statement of reply of the plaintiff. This was documented in encl 23 and stated to be premised on O 18 r 14 of the RC 2012 and the court's inherent jurisdiction.

[29] Having heard oral submissions by counsel for both litigants, I dismissed the application. The reasons for the refusal, and the relevant arguments posited by counsel on the application are examined in the following paragraphs.

Incorrect basis

[30] The defendant grounded this application for leave to file a rejoinder on O 18 r 14 of the RC 2012. This provision reads:

> 14 Denial by joinder of issue (O 18 r 14)
>
> (1) If there is no reply to a defence, there is an implied joinder of issue on that defence.
>
> (2) Subject to paragraph (3) —
>
> (a) there is at the close of pleadings an implied joinder of issue on the pleading last served; and
>
> (b) a party may in his pleading expressly join issue on the next preceding pleading.

(3) There can be no joinder of issue, implied or express, on a statement of claim or counterclaim.

(4) A joinder of issue operates as a denial of every material allegation of fact made in the pleading on which there is an implied or express joinder of issue unless, in the case of an express joinder of issue, any such allegation is excepted from the joinder and is stated to be admitted, in which case the express joinder of issue operates as a denial of every other such allegation.

[31] I struggle to appreciate the basis of the defendant's relianceon O 18 r 14 to support his application. Order 18 r 14 as set out above clearly provides that at the close of pleadings, there is an implied joinder of issue on the pleading last served. This fortifies the position of the plaintiff. Order 18 r 14(4) also sets out the rule that a joinder of issue operates as a denial of every material allegation of fact made in a pleading on which there is an implied or express joinder of issue.

[32] Again this supports the position of the plaintiff, as indeed it was a ground for my dismissing the earlier application by the defendant to expunge. At the hearing, the counsel for the defendant gave no explanation on this question.

[33] As I stated earlier in my refusal of the expunge application, the defendant could have also asked for leave to file a joinder under O 18 r 4. This provision quite straightforwardly states thus:

4 Pleadings subsequent to reply (O 18 r 4)

Pleadings subsequent to a reply or a defence to a counterclaim shall not be served except with the leave of the Court.

[34] Surely O 18 r 4 ought to have been the correct basis to premise the application now before me. On this ground alone, in the absence of an explanation by the defendant at the hearing, which makes the error, if indeed it was one, of a more fundamental one, to justify reference to O 18 r 4 instead, what more a satisfactory one, the instant application cannot be sustained and must be refused.

The proposed rejoinder unnecessary

[35] The defendant argued at the hearing that the application was necessary to afford the defendant the opportunity to answer to the statement of reply, particularly paras 4.6 and 4.10 therein which pleaded that the defendant was a 'dishonourable debtor'. For that purpose, the defendant had also furnished the proposed rejoinder, as exhibited to the affidavit of the defendant affirmed on 3 May 2018 ('the proposed rejoinder').

[36] The proposed rejoinder is not very long. It would be remiss of me not to set it out in its entirety, for better appreciation of the issues, hereunder:

(a) the defendant joins issue with the plaintiff on the matters raised in para 4.6 of the plaintiff's reply dated 5 February 2018 ('the plaintiff's reply), and puts the plaintiff to strict proof thereof;

(b) further and/or in the alternative, the defendant says that the matters as set out in para 4.6 of the plaintiff's reply are factually incorrect or not true in some material respects;

(c) further and/or in the further alternative, the defendant says that the matters as set out in para 4.6, even if they be factually correct (and which the defendant says they are not), are absolutely of no relevance to the plaintiff's claim as against the defendant in the matter herein and in consequence must be totally disregarded by this honourable court;

(d) further and/or in the further, further alternative, the defendant says that the matters as stated in para 4.6 of the plaintiff's reply have absolutely no casual connection with the plaintiff's alleged claim as against the defendant, as per the plaintiff's statement of claim filed in the matter herein;

(e) the defendant very vehemently refutes the unfounded allegation in para 4.10 of the plaintiff's reply that the defendant is a 'dishonourable debtor', and puts the plaintiff to strict proof of the said allegation;

(f) the defendant further says that the very serious allegation in para 4.10 of the plaintiff's reply that the defendant is a 'dishonourable debtor' is conduct on the part of the plaintiff that is mischievous and deliberately intended to embarrass the defendant and prejudice this honourable court;

(g) further and/or in the alternative, the defendant takes very strong exception to the reference in para 4.10 of the plaintiff's reply that the defendant is a 'dishonourable debtor', as being a very serious allegation, touching upon and concerning the personal reputation and integrity of the defendant;

(h) further and/or in the further alternative, the defendant says that given the fact that a judicial determination by this honourable court on the plaintiff's claim is still pending, the allegation that the defendant is a 'dishonourable debtor' is conduct on the part of the plaintiff constituting a pre-judging of the fundamental issue in the matter herein and which is on whether the defendant can, in fact and in law, be classified a debtor of the plaintiff in the claim herein under the laws of

Malaysia; and

(i) further and/or in the further, further alternative, the defendant says that the allegation in the plaintiff's reply that the defendant is a 'dishonourable debtor' in the face of the pending proceedings before this honourable court, and premised on the plaintiff's statement of claim, is conduct on the part of the plaintiff constituting an usurpation of the powers of this honourable court, and is therefore scandalous, frivolous and vexatious, and an abuse of the process of this honourable court.

[37] Even a cursory review of the proposed rejoinder will readily lead one to the conclusion that it does not truly provide any substantive response to the pleadings in the statement of reply that the defendant is strongly opposing.

[38] Thus, the para 1 of the proposed rejoinder merely puts the plaintiff to strict proof in respect of para 4.6; para 2 says the para 4.6 is not true; para 3 avers that para 4.6 is not relevant to the plaintiff's claim; para 4 pleads that para 4.6 has no causal connection with the claim; para 5 merely refutes the allegation of 'dishonourable debtor'; para 6 states para 4.10 is intended to embarrass the defendant; para 7 reiterated the strong exception taken by the defendant to the reference of 'dishonourable debtor'; para 8 states that such a reference constituted a pre-judging of the issue which has yet to be determined by this court; and in para 9 concluded by pleading that attribution of the reference of 'dishonourable debtor' to the defendant is an abuse of the process of the court.

[39] Other than simple denials, requiring the plaintiff to prove its allegations, saying the pleadings to be irrelevant, prejudicial and an abuse of process, the defendant did not provide any real reply to the allegations in paras 4.6 and 4.10 that he had always said he wanted to respond to. There was absolutely no attempt whatsoever to state why the allegations made by the plaintiff in the statement of reply were untrue or false.

[40] Further, the proposed rejoinder suffers from another infirmity. It made mention of the plaintiff to be put on strict proof and the paras 4.6 and 4.10 to be irrelevant, among others. But it is both superfluous and entirely unnecessary for the defendant to have provided the kind of pleadings as proposed to be in the proposed rejoinder.

[41] For it certainly goes without saying that the burden is on the plaintiff to prove its case and the allegations it had included in its pleadings. Similarly, whether the matters pleaded by the plaintiff are relevant to its claim is a burden

for the plaintiff to discharge, by adducing admissible evidence at trial. Even without the defendant pleading that the plaintiff is put to strict proof, it cannot conceivably be denied that the plaintiff must establish its case and prove its assertions.

[42] I cannot see the logic behind the defendant's insistence on asking for a rejoinder (or to expunge the reply pleadings, earlier) if what he now proffers in the proposed rejoinder are for all intents and purposes, bare denials.

[43] After all, there is no risk of the pleadings in the statement to be deemed admitted by the defendant merely because there is no rejoinder to the reply. The failure to contradict should not be treated as an admission under the established principle stated in the leading case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 because that case concerned un-replied averments in affidavits, not statements in pleadings. More importantly, under pleading rules it is plain from O 18 r 14(2)(a) as mentioned earlier, that there is already an implied joinder of issue in the last pleading.

[44] A basis that could be invoked to justify leave for rejoinder is the provision of the above-mentioned O 18 r 8(1) of the RC 2012 (which earlier was relied on by the plaintiff to justify the matters pleaded in its statement of reply) which requires matters which must be specifically pleaded subsequent to a statement of claim for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality in circumstances set out earlier in this judgment.

[45] But again, it is clear that the proposed joinder does not contain any pleadings that could be said to fulfil the requirements of O 18 r 8(1). No less significantly, neither did the defendant assert that he rely on O 18 r 8 to justify leave for the filing of the proposed rejoinder.

Leave cannot be justified

[46] It is plain that O 18 r 4 is designed to ensure the close of pleadings, and avoid the pre-trial process going on indefinitely. And there are authorities which held that leave to serve a rejoinder or subsequent pleadings will not be granted unless it is required for matters which must be specifically pleaded in adherence to O 18 r 8, as stated earlier (see *Harry v Davey* (1876) 2 Ch D 721 and *Norris and another v Beazley* [1874–80] All ER Rep 774; (1877) 2 CPD 80). It has been stated earlier that this is not the case in the instant application before me.

[47] The application for leave for the filing of the rejoinder is therefore untenable. Assuming the defendant had intended to rely on O 18 r 4 to seek

leave of court instead of O 18 r 14 as documented in its encl 23, there is no legitimate basis for leave to be granted. The burden is on the plaintiff to establish its case and prove the matters it had pleaded. Even the proposed rejoinder exposed the absence of any substantive reply by the defendant to paras 4.6 and 4.10 in the statement of reply.

[48] This stark inconsistency between what the defendant had proposed to plead in reply and the strong objection the defendant had against the inclusion of paras 4.6 and 4.10 in the statement of reply is difficult to fathom, other than, possibly, representing efforts on the part of the defendant towards delaying the proceedings.

Res judicata and other considerations

[49] I cannot but further agree with the plaintiff that the application herein is incompetent by reason of res judicata. All the grounds put forth by the defendant in support of his encl 23 are repeated from his earlier unsuccessful attempt to expunge the two paragraphs in the statement of reply of the plaintiff. The substance of this application is the same as the previous attempt to expunge the two paragraphs. The defendant wants to have the paragraphs either removed or replied to.

[50] The inescapable and irresistible conclusion in this instant case must also be that the present application is fatally impaired by reason of res judicata. It cannot be allowed to succeed in view of issue estoppel (see the Court of Appeal decision in *Wong Sin Fan & Ors v Ng Peak Yam & Anor* [2011] 9 CLJ 873). The specific issues in contention had been adjudicated on, and that too by instalments. Issue estoppel applies to resolutely prevent yet another round of litigation of the same issues. This court cannot countenance this wholly unnecessary endeavour.

[51] The Supreme Court made it clear in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 that there are two kinds of *estoppel per rem judicatum*, namely cause of action estoppel and issue estoppel. The scope of the plea of res judicata was clarified in the following terms:

> [1] The significance of *res judicata* lies in its effect of creating an *estoppel per rem judicatum*, which may take the form of either cause of action estoppel or issue estoppel. The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, that is the cause of action, merges into the said final judgment. The issue estoppel, on the other hand, means simply an issue which a party is estopped from raising in a subsequent proceeding.
>
> [2] The doctrine of *res judicata* is not confined to causes of action or issues which the court is actually asked to decide or has already decided. *It covers also causes of action*

or issues or facts which, though not already decided as a result of the same not being brought forward due to negligence, inadvertence or deliberately, are so clearly part of the subject matter of the litigation and so clearly could have been raised, that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. (Emphasis added.)

[52] The Supreme Court referred to and applied the following common law principles in its exposition of the scope of the doctrine of res judicata. First, the passage by Wigram VC in the case of *Henderson v Henderson* [1843–60] All ER Rep 378 at p 382; (1843) 3 Hare 100 at p 115 which reads:

> The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the same subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

[53] In addition, the meaning of the words in the said above statement, namely 'every point which properly belonged to the subject of litigation' was explained by Somervell LJ in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257 as follows:

> ... *res judicata* for this purpose is not confined to the issues which the Court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.

[54] The defendant could have in the first application asked for leave to file a rejoinder under the clear provision of O 18 r 4 instead or premising his application on doubtful basis. The defendant could have even asked for an oral amendment of its earlier application and have it converted into one accurately grounded under O 18 r 4, or at least to have an alternative prayer included to justify leave. But he did not. Only now the defendant seeks to invoke O 18 r 4.

[55] And in *SA Andavan v Registrar of Titles, Negeri Sembilan & Ors* [1977] 2 MLJ 220, the High Court observed:

> Parties in civil suits should observe the rules of procedure with meticulous care because a failure to do so may well result in irreparable set-backs for them and it is not often that a court will take it upon itself to free the parties from difficulties of their own making and put them on their feet again.

[56] This observation in my view, continue to hold true post the coming into force of the RC 2012. The course of action employed by the defendant does

A little to advance the fair just and economical disposal of cases, if not tantamount to a borderline abuse of process. It does not promote an efficient administration of justice at all.

B **[57]** The defendant has also effectively presented its case against the reply pleaded by the plaintiff in instalments. That is an approach that must not be countenanced. In *Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479 where in the latter, Gopal Sri Ram JCA (as he then was) held:

> C Applying the foregoing principles to the facts of the present case, it was certainly open to the appellant to ground its first application on the basis that the default judgment was irregular for the reasons we have set out earlier in this judgment. It was therefore an issue which properly belonged to the first application. But it chose not to rely upon that ground. Once the first application was dismissed, it was not open to the appellant to make a second application to set aside the judgment on a different ground. It would, as Haidar JCA observed during the course of En Zainur's argument, amount to presenting one's case in instalments. That is something the law does not permit.

[58] As such, the defendant should rightfully be prevented from now E applying for leave. He should be estopped from taking this contrary position now (see the leading Federal Court decision in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283). It would be inequitable to the plaintiff if it were otherwise.

F **[59]** Other than res judicata, his shifting position reeks of the less than favourable conduct of approbating and reprobating. The defendant cannot simply blow hot and cold. In the case of *Bakti Dinamik Sdn Bhd v Bauer (M) Sdn Bhd* [2016] MLJU 1878; [2016] 10 CLJ 247, I stated thus:

> G [43] The position taken by the plaintiffs currently may be characterised as one which violated the principle against 'approbating and reprobating'. In the Court of Appeal case of *Visage Continental Sdn Bhd v Smooth Track Sdn Bhd* [2007] 6 CLJ 570, Richard Malanjum JCA (as His Lordship then was) referred to various authorities and enunciated clearly the rule that a party should not be allowed to H approbate and reprobate as it is a practice that is both plainly unconscionable and unfair.

CONCLUSION

I **[60]** In view of the foregoing reasons, in my judgment, the defendant has not been able to establish his case for leave be granted to file the proposed rejoinder. Accordingly, I dismiss encl 23, with cost.

Application dismissed.

Reported by Ashok Kumar